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Supreme Court, U.S.
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No. 03-199

IN THE

Supreme Court of the United States

JERRY R. PIKE and PATRICK A. THOMAS,

Petitioners,

v.

LUCENT TECHNOLOGIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Jerry R. Pike and Patrick A. Thomas were Plaintiffs and Appellants in the proceedings below.

Respondent Lucent Technologies, Inc. was Defendant and Appellee in the proceedings below.

Lucent Technologies, Inc. has no parent company and no publicly held company owns 10 percent or more of its stock.

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INTRODUCTION

Petitioners Jerry R. Pike (age 52) and Patrick A. Thomas (age 48) worked for Lucent Technologies, Inc. as Account Executives on its BellSouth Customer Team ("BSCT"). Petitioners filed their complaint under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA") and state discrimination laws.

Petitioners allege that the highest levels of Lucent management developed a scheme to "purge" older workers from the company. Petitioners allege that, as part of this scheme, Lucent developed the Talent Assessment Process to systematically select older workers for discharge. The Talent Assessment Process involved ranking all employees in the Top 10% and Bottom 10% of their operational unit. Petitioners allege that Lucent ranked both of them in the Bottom 10% of the BSCT during this process because of their age. Neither Petitioner, however, was discharged based on this ranking. Thomas voluntarily transferred to a different Lucent department and he remained employed until he voluntarily resigned in 2001. Pike was discharged approximately eight months after the Talent Assessment Process was completed as part of an unrelated reduction-in-force.

In the litigation, Petitioners did not uncover any evidence to support their theory that Lucent sought to "purge" older workers or that they were selected for the Bottom 10% based on their age. To the contrary, the evidence shows that Lucent's BSCT actively recruited and retained older workers during the time that the alleged purge was occurring. As a result of Lucent's efforts, after the Talent Assessment Process was completed, the percentage of workers over age 40 on the BSCT had increased. In addition, Petitioners could not rebut the reasons for their ranking in the Bottom 10% of the BSCT or for Pike's discharge under the reduction in force — their relative lack of skills and their focus on selling products which were becoming obsolete and being de-emphasized by Lucent.

Importantly, there also was no evidence that Petitioners' age factored into any part of the decision-making processes. The relevant decision-makers were each older than Petitioners and were also evaluated under the same Talent Assessment process. Given their age, these decision-makers plainly would not have cooperated in a scheme to purge older workers. Under these facts, the District Court properly dismissed Petitioners' claims and this dismissal was affirmed by the Eleventh Circuit.

Petitioners argue that the Eleventh Circuit erred because it did not follow this Court's decisions establishing the applicable summary judgment standards. The Eleventh Circuit, however, followed all of this Court's precedent regarding the applicable summary judgment standard. Nonetheless, Petitioners argue that the Eleventh Circuit should have analyzed their claims using the mixed motive analysis announced by this Court in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003). *Costa*, however, is not applicable in this case. In *Costa*, this Court found that Congress changed the mixed motive analysis for claims arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, through the Civil Rights Act of 1991 ("1991 CRA"). The 1991 CRA's mixed-motive amendments, however, do not apply to ADEA claims.

Moreover, even if *Costa* did apply, it would not have saved Petitioners' claims because they did not present evidence that their age was a motivating factor in the challenged decisions. At best, Petitioners raised a *prima facie* inference of discrimination, but their evidence was insufficient to trigger a mixed motive analysis. For this additional reason, Petitioners arguments lack merit and the Court should refuse to review the lower courts' rulings.

Given the lack of merit in Petitioner's claims, the Eleventh Circuit's ruling on their collective action allegations is moot. Nevertheless, the evidence demonstrates that

Petitioners never requested to proceed as a collective action and they failed to file consents mandated by the applicable statute. The Eleventh Circuit, therefore, properly applied 29 U.S.C. § 626 to find that they could not pursue a collective action. For these reasons, the Court should deny Petitioners request for review of the collective action decision in this case.

COUNTERSTATEMENT OF THE CASE[1]

Lucent is a corporation that manufactures and sells equipment and provides related services to companies in the telecommunications industry. (Dunlap Dec. ¶ 2). Pike and Thomas both worked as Sales Account Executives on Lucent's BSCT. The BSCT was responsible for selling Lucent equipment to BellSouth Corporation ("BellSouth") throughout the Southeast. (Dunlap Dec. ¶ 3; Pike Dep. p. 26).

A. Lucent's Products

The BSCT Account Executives were categorized into groups such as the Network Products Group ("NPG") and the Optical Networks Group ("ONG") according to the type of products that they sold. (Dunlap Dec. ¶ 8; Pike Dep. pp. 34, 48). NPG products include those which are based on mature technology, and they are often referred to as "copper" products. (Dunlap Dec. ¶ 8; Pike Dep. pp. 34-35). The NPG products were considered "commodity" products, which mean almost any company could manufacture these products. (Dunlap Dec. ¶ 8). Due to the competition in this market, the NPG products were generally lower revenue products. (Dunlap Dec. ¶ 8).

The ONG products are based on optical transmission technology, and they are often referred to as "optical

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1. The Statement of Facts set forth in the Petition does not contain any of the relevant facts considered by the lower courts and, accordingly, Lucent provides this summary.

products". (Dunlap Dec. ¶ 9; Pike Dep. p. 36). These products first began to be developed in the late 1980s and, in comparison to NPG products, they are more technically sophisticated, and they can carry a significantly greater amount of information at a much greater speed. (Dunlap Dec. ¶ 9).

In the 1990s, BellSouth began to shift its focus toward ONG products because of their relative advantages over NPG products. (Dunlap Dec. ¶ 10). At the same time, Lucent began to aggressively market and develop ONG products, and it viewed these products as the future for Lucent. (Dunlap Dec. ¶ 10).

B. Pike Was Responsible For NPG Sales In South Florida and His Supervisors Viewed Him As One of the Lowest Performers.

When he became a BCST Account Executive, Pike was primarily responsible for selling NPG products in South Florida. (Pike Dep. p. 27). At that time, Sales Manager Dave Collins supervised Pike. (Collins Dec. ¶ 3). Collins supervised Pike for more than two years, and he believed that Pike was one of the lowest performing Account Executives that he supervised. (Collins Dec. ¶ ¶ 3, 6). Collins noted that Pike had developed a perception that certain customers were not receptive to him and that they viewed him, the Company and its products in a negative light. (Collins Dec. ¶ 4; Pike Dep. p. 65, 71, Exh. 6 to Pike Dep.). Pike also demonstrated difficulty in establishing relationships with some of his customers at BellSouth. (Collins Dec. ¶ 5). On at least one occasion, Pike avoided a key customer because he believed that the customer was not receptive to him. (Collins Dec. ¶ 5; Pike Dep. pp. 65, 71, Exh. 6 to Pike Dep.). Collins believed that Pike did not aggressively pursue, or endeavor to inform himself of, new contacts at the customer, or all new avenues of business with the customer. (Collins Dec. ¶ 5).

In November 1998, Sales Manager George Dunlap replaced Collins and assumed responsibility for Florida. (Dunlap Dep. pp. 9-10; Dunlap Dec. ¶ 22). When he transitioned his employees to Dunlap, Collins told Dunlap that Pike was one of the lowest performing Account Executives. (Dunlap Dep. p. 38). Collins told Dunlap that Pike had a "dark cloud over his head," and he had a negative attitude about the Company. (Dunlap Dep. p. 38). Based on his experiences with Pike, Dunlap formed the same opinion of Pike's relative skills and performance.

C. Thomas Was Responsible For Sales In Kentucky and Three Supervisors Viewed Him As A Poor Performer.

Like Pike, Thomas was a BSCT Account Executive who was primarily responsible for selling NPG products, and his sales territory was Kentucky. (Thomas Dep. pp. 17-18, 31-33; Dunlap Dec. ¶ 14). In 1996, Lucent laid off an Account Executive located in Kentucky and, as a result, Thomas also assumed responsibility for ONG sales in Kentucky. (Thomas Dep. pp. 11-12, 36-37). At that time, Sales Manager Dennis Beck supervised Thomas. (Thomas Dep. pp. 45, 109-10).

Lucent gave Thomas sufficient training to become familiar with ONG products. (Thomas Dep. pp. 37-38). Nevertheless, Thomas never became sufficiently familiar with these products to sell them effectively. (Dunlap Dec. ¶ 16; Thomas Dep. pp. 39-40). Thomas frequently had to call either his supervisors or other headquarters sales and technical personnel to make sales presentations or product demonstrations for him to BellSouth's network planners. (Dunlap Dec. ¶ 16). In fact, each of the three Sales Managers who supervised Thomas after he received responsibility for ONG sales discussed with him the fact that he needed to increase his knowledge of ONG products. (Thomas Dep. pp. 45-48; Dunlap Dec. ¶¶ 15-16; Dunlap Dep. pp. 132-36).

In 1997, Sales Manager George Dunlap replaced Beck and became Thomas' supervisor. (Dunlap Dep. pp. 9-10). At that time, Dunlap met with Beck and told him that Thomas was "not one of the best Account Executives" under his supervision. (Dunlap Dep. pp. 131-33). In particular, Beck told Dunlap that Thomas did not learn the ONG product line as quickly as he should have. (Dunlap Dep. pp. 133-136). Beck also told Dunlap that he had considered terminating Thomas in 1996 when he laid off the other Kentucky Account Executive, but that he did not do so because he did not want to be left without an Account Executive in Kentucky. (Dunlap Dep. pp. 133-34).

After supervising Thomas, Dunlap had many of the same concerns regarding Thomas' performance that Beck had identified to him. (Dunlap Dec. ¶ 15). In particular, Dunlap believed that Thomas did not have sufficient ONG product knowledge to make presentations, answer technical questions, and develop solutions to customer problems. (Dunlap Dec. ¶ 16; Dunlap Dep. pp. 109-10). In addition, Dunlap noted that Thomas did not have sufficient contact with his BellSouth customers to understand BellSouth's needs and plans for its network in Kentucky. (Dunlap Dec. ¶ 18).

In March 1999, Lucent again shifted sales territories, and Sales Manager Don Smith assumed responsibility for Kentucky from Dunlap. (Smith Dep. p. 20). As part of this transition, Smith discussed Thomas' performance with Dunlap. (Smith Dep. pp. 53-57, 73-76). Dunlap told Smith that Thomas was one of his weakest Account Executives, and that he was not current on the ONG technology. (Smith Dep. pp. 73-76). Dunlap also noted that Thomas was not effective at sales presentations, and that he required assistance from other employees to handle his presentations. (Smith Dep. pp. 73-75).

After this meeting, Smith attended a client meeting with Thomas in Louisville, Kentucky. (Smith Dep. pp. 52, 58-64). Based on this meeting, Smith determined that Thomas did not have a good relationship with the client. (Smith Dep. pp. 52, 58-64). Smith also noted that the client directed most of the technical questions to him, rather than to Thomas, which suggested that the client did not have confidence in Thomas' ability to handle these questions. (Smith Dep. pp. 52, 58-64). Smith determined that Thomas was not suited for a job that involved direct aggressive sales with front line customers in a technical optical networking environment. (Smith Dep. p. 71).

D. Sales Executive Steven Russell Assumed Responsibility for the BSCT And Lucent Established the Talent Assessment Process.

On or about March 4, 1999, Lucent initiated a Talent Assessment process designed to evaluate the skills possessed by its employees, and to determine the proper role for them in the company based on the changing market and Lucent's future needs. (May Dep. pp. 33-34, 69; Spurrier Dep. pp. 19-20, 32-33, 37-38). This process was designed to "raise the bar" and improve Lucent's talent level by identifying those employees with high and low relative skills, performance and/or behaviors. (Dunlap Dec. ¶ 26).

In late April, 1999, the Sales Vice President for the BSCT (Steven Russell) held a meeting to explain this process. (Dunlap Dep. pp. 84-85, 91-92). Russell explained that each level of management was expected to begin meeting to identify the Top 10%, Middle 80% and Bottom 10% performers among their subordinates. (Dunlap Dec. ¶ 27; Dunlap Dep. pp. 89-90). For example, the Sales Managers evaluated the Account Executives and lower level employees under their supervision and, in turn, the Sales Directors would perform the same evaluation of the Sales Managers under their supervision. (Dunlap Dec. ¶ 27; Dunlap Dep. pp. 89-

90). At the end of this process, the BSCT was required to create action plans for the Top 10% performers, which could involve increased job responsibility, training, and other actions designed to prepare them for advancement in the business. (Dunlap Dec. ¶ 28; Dunlap Dep. pp. 86-87). At the same time, the BSCT was required to develop action plans for the Bottom 10% performers, which could involve an attempt to improve their performance, a transfer to a position more suited to their skills, or an exit from the business. (Dunlap Dec. ¶ 28).

Because the Sales Managers were comparing the Account Executives to one another, it is possible that an Account Executive who had received good performance reviews and had overall satisfactory performance would be ranked in the Bottom 10% based on his performance relative to the other BSCT Account Executives. (Dunlap Dec. ¶ 30). In addition, rather than merely evaluating the Sales Account Executives' prior performance, as had been done in the performance evaluations, the Sales Managers were also asked to examine their skills, Lucent's future needs, and the Account Executive's ability to adapt and succeed in the future. (Dunlap Dec. ¶ 30; May Dep. pp. 146-47).

1. Dunlap and Smith Selected Petitioners for the Bottom 10%.

At that time, most of the Account Executives were located at BellSouth's headquarters. Dunlap and Smith were the only Sales Managers who supervised Account Executives who handled sales in the field, rather than at headquarters. Therefore, prior to the first meeting among the Sales Managers to evaluate all BSCT Account Executives, Smith and Dunlap met to discuss the field sales Account Executives to ensure that their rankings at the subsequent Sales Manager meetings would be consistent. (Smith Dep. pp. 113-14).

Dunlap determined that Pike was one of the Bottom 10% performers based on his prior experience with him. (Dunlap Dec. ¶ 32). Dunlap noted that Pike was pessimistic, had a "gloom and doom" approach to sales and acted as if "everything that can go wrong, will go wrong." (Dunlap Dep. p. 107; Dunlap Dec. ¶ 33). Dunlap also noted that Pike had been working with NPG products for more than twelve years, and that he had never expanded his areas of expertise. (Dunlap Dep. p. 108). Dunlap based his opinion on his personal experiences with Pike, including his telephone conversations and personal visits with Pike, and the input he had received from Pike's former supervisor, Dave Collins. (Dunlap Dep. pp. 60-64, 66-69, 108).

Dunlap also believed that Pike's attitude adversely affected his sales presentation skills. (Dunlap Dep. pp. 61-64). At one presentation in particular, Pike told the decision-makers that the product he was trying to sell them had not been approved for purchase by BellSouth, and that he did not know if it could be approved. (Dunlap Dep. pp. 62-63). Dunlap was seriously concerned about Pike's comment because, as a salesman, he believed that you should present your best case to the customer. (Dunlap Dep. pp. 62-63). Dunlap was stunned that Pike had volunteered reasons that BellSouth could not use his product in his sales pitch. (Dunlap Dep. pp. 62-63; Dunlap Dec. ¶ 23). At the time that Dunlap (age 52) made this determination, he was older than Pike. (Dunlap Dep. p. 194; Pike Dep. p. 12).

Smith and Dunlap also discussed Thomas and both agreed that he was one of the Bottom 10% performers based on their prior experience with him, including his demonstrated resistance to learning new products, his relative lack of creativity and aggressiveness as compared to other Account Executives, and his lack of contact with key customers. (Dunlap Dec. ¶ 32). Although Smith had only supervised Thomas for a short time, he had knowledge of Thomas through past experience on the BSCT, including his

involvement at sales meetings and other team functions, and based on his knowledge of the BSCT's performance over time. (Smith Dep. pp. 51-64, 107-08). In addition, Smith was aware of the performance of other Account Executives whom he had supervised, and Thomas did not compare favorably to these other Account Executives. (Smith Dep. pp. 123-26). At the time that Smith (age 48) and Dunlap (age 52) conducted these evaluations, they were both older than Thomas. (Smith Dep. p. 28; Dunlap Dep. p. 194; Pike Dep. p. 12; Exh. I).

At the time that he ranked Thomas in the Bottom 10%, Smith supervised a total of nine Account Executives. (Dunlap Dec. ¶ 32). Of these nine, Thomas was the third youngest at age 47. (Dunlap Dec. ¶ 32). At the same time, Smith placed Tommy Walker (age 50) in the Top 10%. (Dunlap Dec. ¶ 32; Exh. I).

2. The Sales Managers Conducted Three Meetings to Identify the Top and Bottom 10% Among BSCT Account Executives.

Beginning on April 21, 1999, the Sales Managers held three meetings at which they discussed the Top 10% and Bottom 10% ranking decisions for all BSCT Account Executives. (Chance Dep. pp. 85, 115). Fifteen of the sixteen Sales Managers at these meetings were over age forty, and twelve of them were older than Thomas. (Dunlap Dec. ¶ 37; Exh. I). In addition, all of the Sales Managers were going to be ranked by their superiors (the Sales Directors) using the same criteria they had used to evaluate the BSCT Account Executives.

At these meetings each Sales Manager identified the Top and Bottom 10% Account Executives from his Team, and the other Sales Managers discussed whether they agreed with the assessment. (Dunlap Dep. pp. 98-99). Dunlap placed Pike among the Bottom 10% performers and Smith placed Thomas among the Bottom 10% based on their relative performance

as compared to the other BSCT Account Executives. (Dunlap Dec. ¶¶ 33-34). No one at the Sales Manager meetings suggested that either Pike or Thomas did not belong in the Bottom 10%. (Dunlap Dec. ¶ 34; Chance Dep. p. 78).

3. After the Talent Assessment Process, the Percentage of Older Workers on the BSCT Increased.

In the one year following the completion of the Talent Assessment process, the percentage of employees over age 40 on the BSCT increased from 67% to 70%. (White Expert Report, pp. 4-5). During that time frame, the BSCT hired seven managers, five of whom were over age forty and three of whom were over age fifty. (May Dec. ¶ 7). In addition, the BSCT offered stock options to at least forty-eight managers over age 40 as an incentive to remain on the BSCT. (May Dec. ¶ 4; Exh. 2 to May Dec.; White Expert Report p. 5; Table 6 to White Expert Report).

E. Before the Talent Assessment Process was Completed, Thomas Voluntarily Sought a Different Position with Lucent.

Although Thomas was selected for the Bottom 10%, Lucent never assigned an action code to him and in turn never determined whether it would train, transfer or discharge him. Before management informed him of his ranking, Thomas had heard a rumor from Pike that he might be included in the Bottom 10% and he chose to find another job within Lucent before any decision was made. (Thomas Dep. pp. 50, 116, 120-21). On or about July 1, 1999, Thomas transferred to an Operations Supervisor position in the Installation Department. (Thomas Dep. pp. 120-21). After his transfer to Installation, no one was hired to replace Thomas. (Dunlap Dec. ¶ 45). Thomas' former duties were assumed by Dixie Riddle (age 56) and George Knieriem (age 55). (Smith Dep. p. 126; Exh. I). To date, Lucent has not hired a BSCT Account Executive in Kentucky. (Dunlap Dec. ¶ 45).

Thomas remained in the Installation Department until July, 2001. At that time, Lucent created a program that offered enhanced retirement benefits to employees who resigned their employment, which was called the "5 and 5" program. (Dunlap Dec. ¶ 2; Smith Dep. p. 30). On or about July 15, 2001, Plaintiff voluntarily resigned his employment under the "5 and 5" program. (Dunlap Dec. ¶ 21). Thomas admits he did not experience any age discrimination during the remainder of his tenure with the Installation Department. (Thomas Dep. p. 124).

F. After The Talent Assessment Process Was Completed, Pike Was Transferred to the Sales Realization Organization ("SRO") and Later Was Discharged as Part of a Reduction in Force.

Unlike Thomas, Pike remained with the BSCT for approximately eight months until he was downsized as part of a reduction in force. After his selection to the Bottom 10%, Lucent initially assigned Pike to a newly-created organization, the Sales Realization Organization ("SRO"), which was responsible for handling contract or technical issues that arise after a sale is completed. (Thrift Dec. ¶ 3; Spurrier Dep. pp. 56-57).

Although he was officially assigned to SRO, Pike continued to function as an Account Executive. (Pike Dep. p. 176). Pike admits he did not accomplish anything while assigned to the SRO. (Pike Dep. p. 187). Instead, Pike repeatedly expressed dissatisfaction with his assignment to SRO and requested that he be moved back into his field sales position. (Thrift Dec. ¶ 3; Pike Dep. pp. 176, 185). Based on his request, Pike was ultimately transferred back to field sales and began to sell NPG Products in South Florida. (Thrift Dec. ¶ 3; Pike Dep. pp. 177-78). After his transfer, Pike reported to Sales Manager Don Smith. (Thrift Dec. ¶ 3).

Pike remained in field sales until he was discharged as part of a reduction in force. In November, 1999, Lucent determined that it would need to reduce expenses drastically and, as part of that effort, the BSCT had to reduce headcount. (Chance Dep. pp. 21-22; Thrift Dec. ¶ 6). At that time, Sales Director Vicky Thrift supervised Smith's team. (Thrift Dec. ¶ 6). In deciding which positions to eliminate, the primary factors Thrift considered were the BSCT's new emphasis on centralizing sales and de-emphasis of field sales; the simultaneous increase in focus on ONG products and decreasing importance of NPG; and the ability of a location to function effectively after a headcount reduction. (Thrift Dec. ¶ 9; Smith Dep. p. 147; Spurrier Dep. p. 55; Dunlap Dep. p. 92; Thomas Dep. pp. 75, 81). Thrift decided to select Pike for the reduction in force, rather than Account Executive Rick Gomez based on Smith's input about Pike and Gomez, as well as her own observations and experiences as a Manager on the BSCT (including her conversations with other Managers and meetings where Account Executives were discussed). (Thrift Dec. ¶ 7; Smith Dep. pp. 43-45, 48-49, 146, 150).

Thrift determined that Gomez had expertise in ONG products, whereas Pike's primary experience was in NPG Products, which were being de-emphasized by the customer. (Thrift Dec. ¶ 8; Smith Dep. p. 39) Although Pike was encouraged to expand his knowledge of ONG products through training and by attending presentations with Gomez, he did not develop or retain this important knowledge. (Thrift Dec. ¶ 8; Gomez Dec. ¶ 7). Given BellSouth's emphasis on ONG products, and the de-emphasis of NPG products, Gomez's expertise was more important to the BSCT than Pike's. (Thrift Dec. ¶ 8).

In addition, before coming to Lucent, Gomez had worked for BellSouth for approximately thirteen years. (Thrift Dec. ¶ 9). During that time, Gomez established relationships with important decision makers at all levels of the BellSouth

hierarchy, and he effectively translated these relationships into business for Lucent. (Thrift Dec. ¶ 9). In contrast, Mr. Pike had difficulty establishing relationships with some of his BellSouth contacts and even avoided at least one key customer with whom he was not comfortable. (Thrift Dec. ¶ 9).

Pike's employment with Lucent ended on March 14, 2000. (Thrift Dec. ¶ 11). Mr. Pike was not replaced. Instead his duties were absorbed by Rick Gomez (age 34), Calvin Beck (age 51), Paul Reis (age 41) and Tommy Walker (age 50). (Thrift Dec. ¶ 12).

REASONS FOR DENYING THE PETITION

This Court's own rules mandate that a "petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The Court's rules provide specific examples of the cases it considers for review and further points out that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Despite the clarity of this Rule, Petitioners seek this Court's review of a case that represents the application of well-settled employment discrimination law and presents no issues of general importance. In their attempt, Petitioners have mischaracterized the law of the Eleventh Circuit as well as the decisions of the courts below. The District Court's entry of summary judgment and the Circuit Court's affirmance were proper applications of well-settled law and mandate that the Petition be denied.

I. Petitioners Have Mischaracterized the Eleventh Circuit's Summary Judgment Standard.

Petitioners base their first question presented on the premise that "[t]he Eleventh Circuit's standard for summary judgment in an employment discrimination case is inconsistent with the decisions of this Court." Petitioners'

Brief, p. 5. As discussed below, this statement is simply untrue; the Eleventh Circuit's standards mirror this Court's rulings regarding the proper standard for summary judgment in employment discrimination cases.

A. The Eleventh Circuit Follows this Court's Decisions in *McDonnell Douglas*, *Burdine*, *Hicks*, and *Reeves*.

Petitioners' assertion that the Eleventh Circuit standard for summary judgment conflicts with this Court's decisions is unsupported and simply false. In a case, such as this, where a plaintiff relies on circumstantial evidence of employment discrimination,[2] the Eleventh Circuit consistently follows the burden-shifting framework first articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, it is the plaintiff's initial burden to establish a *prima facie* case of discrimination. *Id.* The requirements of the *prima facie* case can vary depending on the context and "were never intended to be rigid, mechanized or ritualistic." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Furthermore, "[t]he burden of establishing a *prima facie* case is not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). By satisfying the elements of a *prima facie* case, a plaintiff creates an inference of discrimination because it eliminates the most likely legitimate explanations for an

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2. As discussed in more detail below, the Eleventh Circuit has previously applied the holding of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) in "mixed-motive" cases and required plaintiffs in such cases to produce direct evidence to avail themselves of that alternative burden shifting framework. Although this direct evidence requirement has recently been abrogated with respect to discrimination claims brought under Title VII by the Court's decision in *Desert Palace v. Costa*, this decision has no impact on ADEA claims and would not have impacted the Eleventh Circuit's analysis of this case.

employer's adverse action, such as a lack of qualifications or the absence of a job opening. *Id.* at 254.

If a plaintiff creates an inference of discrimination by establishing a *prima facie* case, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for the alleged adverse employment action in order to rebut that inference. *McDonnell Douglas*, 411 U.S. at 802. To do so, the employer must "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 255. The employer's burden at this stage is light, although it is required to articulate its nondiscriminatory reason with some specificity in order to afford the plaintiff "a full and fair opportunity to demonstrate pretext." *Id.* at 255-56. Furthermore, the employer's burden is merely one of production and "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253; *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

If a defendant presents evidence of a legitimate, nondiscriminatory reason for the adverse action, a plaintiff may still prevail by proving that the proffered justification was a pretext for discrimination. *Burdine*, 450 U.S. at 254-56. At this point in the analysis, the plaintiff's burden of showing pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Id.* at 256. To demonstrate pretext, a plaintiff must submit sufficient evidence to establish that the employer's stated reasons for its actions are false. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) (holding that a "plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the

trier of fact to conclude that the employer unlawfully discriminated.").[3]

The Eleventh Circuit has consistently followed this framework and applied each of the decisions cited above on countless occasions, including this case.[4]

B. There is no "Falsity Requirement" Unique to the Eleventh Circuit.

Despite the fact that the Eleventh Circuit consistently adheres to this Court's decisions, and in an attempt to create an issue worthy of the Court's attention, Petitioners argue that their failure to survive summary judgment is the result of a "falsity requirement" that they imply is unique to the Circuit. Petitioners' Brief, p. 5. Petitioners fail, however, to cite any authority for their contention that the Eleventh Circuit's pretext analysis is a departure from this Court's jurisprudence.

Petitioners argue that, in the Eleventh Circuit:

> an employment discrimination plaintiff alleging intentional discrimination cannot survive a motion for summary judgment unless he or she can either (a) adduce substantial evidence that the employer's proffered explanation for the action in question is "false", or (b) offer "direct

3. Although this Court's decision in *Reeves* involved the review of a motion for judgment as a matter of law under Fed. R. Civ. P. 50, the Court noted that the standard for that rule "mirrors" the standard for summary judgment under Fed. R. Civ. P. 56. *Reeves*, 530 U.S. at 150.

4. *See, e.g., EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265 (11th Cir. 2002); *Cofield v. Goldkist, Inc.*, 267 F.3d 1264 (11th Cir. 2001); *Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001); *Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000) (*en banc*); *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000); *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997).

> evidence" that the employer acted with an impermissible motive.

Petitioners' Brief, pp. 5-6. As support, Petitioners cite a page from the Eleventh Circuit's decision in this case where it held that Petitioners failed to provide sufficient evidence to rebut Lucent's legitimate, nondiscriminatory reason (Appendix to Petition for Writ of Certiorari ("App."), p. 6a), a page from the District Court's Order where it simply defines pretext (App. 35a), and several pages from the District Court's Order in which that Court concluded that the Petitioners failed to introduce any direct evidence of age discrimination (App. 20a-25a).

In an attempt to overstate the importance and reviewability of their case, Petitioners are merely applying a different label to the well-established definition of pretext that originated with this Court. The use of the word "false" is by no means a departure from this Court's definition of pretext and, indeed, has been used by this Court to define a plaintiff's standard for demonstrating pretext. As this Court held in *Reeves*, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is *false*, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148 (emphasis added).

As discussed in more detail below, Petitioners did not fail to survive summary judgment because the Eleventh Circuit applied an allegedly unique "falsity requirement." Petitioners did not survive summary judgment because they failed to introduce sufficient evidence to create a triable issue of fact regarding the validity of Lucent's legitimate nondiscriminatory reasons and they failed to establish that age was a motivating factor in any of Lucent's decisions.

II. The District Court and Eleventh Circuit Followed the Appropriate Summary Judgment Standard in This Case.

As discussed above, the Eleventh Circuit applies the burden-shifting framework first articulated in *McDonnell Douglas* and refined through subsequent decisions of this Court. The instant case was a routine application of that framework and represents no departure whatsoever from the well-settled law.

After a thorough review of the substantial record in this case, the District Court initially determined that Petitioners had failed to produce direct evidence of age discrimination. (App. 20a-25a). Petitioners do not challenge this finding, and this finding by no means doomed Petitioners' discrimination claims — it simply resulted in the Court's application of the *McDonnell Douglas* framework.[5] (App. 26a). Citing *McDonnell Douglas* and *Burdine*, *inter alia*, the District Court properly detailed the burden shifting involved in a discrimination case in which a plaintiff lacks direct evidence. *Id.* Consistent with *Reeves*, the District Court noted that "[i]f a plaintiff establishes a *prima facie* case and proffers sufficient evidence to allow a jury to disbelieve the employer's proffered reason for the action, that alone is enough to preclude summary judgment for the employer." (App. 27a).

The District Court applied this framework to the undisputed facts of the case. In doing so, it held that:

> Plaintiffs have presented enough evidence to raise a genuine issue of material fact as to each

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5. As discussed below, Petitioners may very well be arguing that the 1991 CRA modified or replaced the *McDonnell Douglas* framework. Any such argument is unavailing given this Court's own application of the framework in the years following the 1991 CRA. *See, e.g.*, *Hicks*, 509 U.S. 502 (1993); *Reeves*, 530 U.S. 133 (2000); *Swierkiewicz*, 534 U.S. 506 (2002).

> element of the *prima facie* case. Therefore, the burden shifts to Defendant to proffer legitimate nondiscriminatory reasons for Plaintiffs' bottom ten percent rankings, reassignments, and discharge or demotion.

(App. 32a).[6] The District Court then detailed the legitimate, nondiscriminatory reasons articulated by Lucent and turned its attention to the pretext stage of the analysis. (App. 33a-35a). As the District Court properly found, the BSCT Sales Managers evaluated all Account Executives and selected for the Bottom 10% those with the lowest relative qualifications given Lucent's future plans. (App. 12a-13a, 22a-23a). In this case, the evidence showed that Sales Manager Dunlap (age 52) chose Pike because of his pessimistic attitude, his focus on the NPG products that were being de-emphasized by Lucent and its customer, and his relative performance as compared to the other Account Executives he supervised. (App. 33a-34a, 38a; Dunlap Dec. ¶ 32-33; Dunlap Dep. pp. 61-64, 107-08). Likewise, Smith (age 48) and Dunlap chose Thomas because of his focus on NPG products, demonstrated resistance to learning the ONG product, and his relative lack of creativity and aggressiveness as compared to the other Account Executives he supervised. (App. 34a; Dunlap Dec. ¶ 32). Both Dunlap and Smith provided an ample basis for developing these opinions of Petitioners. (Smith Dep. pp. 51-64, 107-08, 123-26). The District Court also found that Sales Director Thrift (age 52) subsequently selected Pike for the reduction-in-force because of his relative lack of ONG knowledge and customer contacts as compared to Gomez. (App. 33a-34a).

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6. Petitioners' Brief repeatedly overstates the significance of the District Court's holding that they created a material issue of fact with respect to their *prima facie* cases. Petitioners even characterize the Court's requirement that they do more than establish their initial *prima facie* burden as a unique requirement of the Eleventh Circuit, rather than the well-settled law of this Court. (Petitioners' Brief, p. 3).

Consistent with the decisions of this Court and the Eleventh Circuit, the District Court explained that Petitioners could satisfy their pretext burden and survive summary judgment if they:

> cast doubt on the proffered reasons, submitting evidence that would permit a reasonable fact finder to conclude that the employer's reasons did not in truth motivate his conduct. In other words, Plaintiffs must demonstrate that a factfinder could determine that the employer's reasons lack credibility.

(App. 35a) (citations omitted). Petitioners, however, did not present evidence to rebut the reasons given by Dunlap, Smith and Thrift for the challenged decisions or demonstrate that these decision-makers did not have a good faith belief in their evaluations of Pike and Thomas. Instead, Petitioners merely offered their opinions of their past performance and they relied on statistics which did not bear on any of the challenged decisions.

In addition, the District Court had a mountain of evidence before it demonstrating that there was no age animus in these decisions. First, all of the decision-makers were older than Petitioners and were subject to the same Talent Assessment process as Petitioners. (App. 37a; Dunlap Dec. ¶ 27; Dunlap Dep. pp. 89-90). Second, although Petitioners presented evidence of sporadic alleged comments mentioning the word "youth" as a positive attribute (which were unrelated to the Talent Assessment process or Pike's reduction in force), the evidence shows that Lucent was actually increasing the number of older workers on the BCST. (White Expert Report pp. 4-5). At the time the alleged "purge" of older workers was occurring, the BSCT was actively recruiting older workers and five of the seven hires during this period were over age 40 and three were over age 50. (May Dec. ¶ 7). In addition, after the alleged age-biased Talent Process was

completed, the percentage of workers over age 40 on the BSCT had increased. (White Expert Report pp. 4-5).

Based on this evidence, the District Court concluded that they failed to meet their burden of proving pretext. (App. 38a). The Eleventh Circuit affirmed this decision, specifically rejecting Petitioners' argument that the District Court had held them to a higher standard or applied anything other than the appropriate burdens and analysis required by *McDonnell Douglas*. (App. 6a). Citing *Reeves*, the Eleventh Circuit held that:

> [t]he district court did not discount or exclude the plaintiffs' evidence from their *prima facie* case when considering whether the plaintiffs had presented sufficient evidence to find pretext. Instead, the district Court merely found that this evidence, though sufficient to establish the *prima facie* case, was not sufficient to permit a reasonable jury to find pretext.

(App. 6a) (internal citation to *Reeves* omitted).

In short, the District Court and the Eleventh Circuit held that, while Petitioner's evidence was sufficient to create a fact issue as to the existence of a *prima facie* case, it was insufficient as a matter of law to do anything more. These decisions therefore fall far short of the "compelling reasons" for review required by this Court.

III. This Court's Decision in *Desert Palace* is Not Applicable to This Case.

Faced with this routine application of the *McDonnell Douglas* framework and the resulting unlikelihood of review, Petitioners attempt to characterize this as a mixed-motive case and create an issue based on the Court's recent decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003). This attempt is unavailing.

In *Desert Palace*, this Court addressed the issue of whether a plaintiff must present direct evidence of discrimination to obtain a mixed-motive jury instruction in a Title VII discrimination case. 123 S. Ct. at 2150 (2003). The Court began its analysis by looking to its decision in *Price Waterhouse v. Hopkins*, 409 U.S. 228 (1989), in which it first established the mixed-motive analysis. *Desert Palace*, 123 S. Ct. at 2150. In *Price Waterhouse*, the Court held that a Title VII plaintiff could establish liability when both legitimate and discriminatory reasons motivated an employment decision, but that an employer could invoke an affirmative defense and avoid all liability if it could prove it would have made the same decision absent the discriminatory reason. The Court divided, however, on what circumstances would shift the burden of proof from the plaintiff to the employer to prove that affirmative defense. Justice O'Conner's concurring opinion in *Price Waterhouse* espoused the view that "the burden of causation would shift to the employer only where a disparate treatment plaintiff [could] show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision." *Desert Palace*, 123 S. Ct. at 2151 (internal quotations from *Price Waterhouse* omitted) (emphasis in original).

After reviewing this decision, the Court turned to the language of the Civil Rights Act of 1991 ("1991 CRA"), which modified and limited the affirmative defense established in *Price Waterhouse*. *Id.* at 2153. This review of § 107 of the 1991 CRA (codified at 42 U.S.C. § 2000e-2(m)) led the Court to conclude that Title VII does not require a plaintiff to produce direct evidence of discrimination to obtain a mixed-motive jury instruction. *Id.* at 2153-55. The Court then held that "[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Id.* at 2155.

In their Brief, Petitioners assume, without explaining, that *Desert Palace*'s holding applies in this case (which involves alleged age discrimination under the ADEA). As discussed below, however, *Desert Palace* is inapplicable and the Eleventh Circuit's decision is not inconsistent with that decision.

A. *Desert Palace* is Not Applicable Because the 1991 CRA Amendments Did Not Affect the ADEA.

This Court held in *Desert Palace* that the 1991 CRA partially abrogated its decision in *Price Waterhouse* by eliminating the requirement that plaintiffs produce direct evidence of discrimination in mixed-motive cases under Title VII. The *Desert Palace* decision, however, rested entirely on the unambiguous language of § 107 and Congress' intent to abrogate *Price Waterhouse* with respect to *Title VII* claims. That section does not apply to the ADEA.

Although Congress partially overruled the Court's holding in *Price Waterhouse* with respect to race, color, religion, sex, and national origin discrimination claims under Title VII, it did not impact age claims under the ADEA. Indeed, in the twelve years since the enactment of the 1991 CRA, numerous Circuits have continued to apply *Price Waterhouse* in ADEA cases. *See DeMarco v. Holy Cross High School*, 4 F.3d 166, 172 (2d Cir. 1993) ("We see no basis for concluding that the new Title VII standard applies to the ADEA, since Congress could have amended the ADEA along with Title VII, but did not."); *Miller v. Cigna Corp.*, 47 F.3d 586, 599 n.10 (3d Cir. 1995) ("The substantive provisions of the 1991 CRA that amended Title VII did not amend the ADEA"); *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 429 n.4 (1st Cir. 2000) (noting that the federal courts faced with the issue have held that the changes made by the 1991 CRA do not apply in the ADEA context); *Lewis v. Young Men's Christian Assoc.*, 208 F.3d 1303 (11th Cir. 2000) (holding that the 1991 CRA is not applicable to the ADEA

and that mixed-motive age cases are therefore properly analyzed under *Price Waterhouse*); *Ziegler v. Delaware County Daily Times*, 128 F. Supp. 2d 790, 794 n.10 (E.D. Pa. 2001) (noting that provisions of the 1991 CRA did not apply to ADEA and that courts continue to analyze age claims under *Price Waterhouse*); *see also Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001) (holding that *Price Waterhouse* remains good law in cases not expressly listed in 42 U.S.C. § 2000e-2(m), citing cases from the First, Second, Third, Fourth, and Eighth Circuits that hold the 1991 CRA does not even apply to retaliation claims brought under Title VII because they are not listed by the statute, and noting that all Circuits that have examined the issue have reached this conclusion).

Petitioners cannot claim that Congress' decision to partially abrogate *Price Waterhouse* with respect to Title VII, but not the ADEA, was the result of inadvertence or oversight. Indeed, Congress expressly referenced and modified the ADEA in other portions of the 1991 CRA. *See Lewis*, 208 F.3d at 1305. Furthermore, courts had applied *Price Waterhouse* to ADEA claims before 1991, putting Congress on notice that it would need to amend the language of the ADEA as well as Title VII if that was its intent. Finally, in the twelve years since the Act, Congress has made no similar efforts to modify the ADEA as it did Title VII. Accordingly, while the *Costa* decision may have a wide-ranging impact on Title VII discrimination claims, it has no impact on the ADEA or the proper resolution of this case.

B. Even if Applicable to the ADEA, *Desert Palace* Has No Effect on the Instant Case.

In addition, even if this Court's decision in *Desert Palace* were applicable to claims brought under the ADEA, that decision would have no effect on the instant case. Although Petitioners' Brief consistently overstates the weight and value of their evidence,[7] it remains clear that the District Court and Eleventh Circuit found only that Petitioners had created a fact issue with respect to their *prima facie* case, but nothing more. *See* App. 6a-7a, 30a-32a, 38a. The courts below never made any finding that age discrimination was a motivating factor in any of Lucent's decisions. The mere fact that Petitioners presented evidence sufficient to create an issue of fact with respect to their *prima facie* case is insufficient to invoke the mixed motive framework. Petitioners must offer stronger evidence to invoke the mixed-motive framework than the evidence needed to establish a *prima facie* case under *McDonnell Douglas*. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir.) ("In such a 'mixed-motives' case, the plaintiff must initially show more than the 'not onerous' *McDonnell Douglas - Burdine* factors."), *cert. denied*, 113 S. Ct. 82 (1992). The District Court and Eleventh Circuit both explicitly held that Petitioners here failed to do so, concluding that they had only satisfied their *prima facie* burden. (App. 6a-7a, 32a, 38a).

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7. *See* Petitioners' Brief at 1 (citing App. 30a and stating "the district court held that petitioners 'offer circumstantial evidence that could support an inference of intentional discrimination"); 2 (citing App 31a and stating "[t]he district court reiterated that the record evidence created an inference of intentional discrimination"); and 8 (citing App. 30a-31a and stating "the District Court repeatedly concluded that the plaintiffs' evidence 'could support an inference of intentional discrimination").

As noted above, Petitioners had no evidence that age was a motivating factor in the challenged decisions. Each of the relevant decision-makers was older than Petitioners and would have no reason to cooperate in an alleged "purge" of older workers. (App. 37a). Moreover, the evidence showed that the percentage of workers over age 40 on the BSCT increased at the time of this alleged purge. (White Expert Report pp. 4-5). In addition, Petitioners did not present evidence necessary to show that any younger Account Executives should have been selected for the Bottom 10% or the reduction-in-force instead of them. (App. 37a). In fact, when Petitioners were asked to name people who should have been ranked below them, Petitioners identified numerous individuals who were over age 40, and others who were even older than them. (App. 37a). Although Petitioners relied heavily on statistics and stray remarks, the lower courts properly found that they were all unrelated to the decisions at issue and were certainly insufficient to create a fact issue regarding the motivation behind the challenged decisions.

Petitioners are essentially reduced to arguing that by merely establishing a *prima facie* case, they are entitled to a mixed-motive analysis and that the courts below therefore erred. This is clearly not the case, as the result would be the denial of summary judgment in any case where an employee over the age of 40 is replaced by someone younger, regardless of the circumstances and in the complete absence of any evidence of discrimination.

The undisputed evidence simply does not support a mixed-motive analysis or a finding that age was a motivating factor in Lucent's decisions. *Desert Palace* is therefore inapplicable. *See Desert Palace*, 123 S. Ct. at 2151 n.1 (expressly avoiding the issue of whether § 107 ever applies outside of the mixed-motive context).

IV. The Courts Below Properly Dismissed Petitioners' Collective Action Claims for Failing to File the Requisite Consents.

As noted above, the Eleventh Circuit properly affirmed the dismissal of Petitioners' claims and there is no basis for reviewing that decision. For that same reason, the Eleventh Circuit's affirmance of the dismissal of their collective action allegations is moot and should not be reviewed since Petitioners did not raise meritorious claims. Nevertheless, Petitioners contend that, even though they never sought to pursue this case as a collective action (other than by putting conclusory allegations in their Complaint), the Court should review the Eleventh Circuit's decision.

Petitioners contend that the District Court and Eleventh Circuit erred in dismissing their collective action claims despite the fact that they failed to file opt-in consents as required by 29 U.S.C. § 256. Petitioners argue that § 256 does not apply to collective actions under the ADEA and that they therefore were not required to file their consents. Petitioners concede that the Eleventh Circuit requires the filing of a timely consent, but argue that decisions issued by the Third and Eighth Circuit have held that the 1991 CRA has abrogated such a requirement.

Petitioners' argument is based on a misinterpretation of the 1991 CRA and its effect on collective actions under the ADEA. In that 1991 CRA, Congress amended the ADEA to change the time period in which a plaintiff may file suit. Specifically, the 1991 CRA required future plaintiffs to comply with Title VII's administrative prerequisites, including filing a Charge of Discrimination. In doing so, Congress deleted 29 U.S.C. § 255 from the FLSA provisions that are applicable to the ADEA. By reducing the statute of limitation to a 90-day period, Congress made the two and three-year statutes of limitation contained in § 255 obsolete. Petitioners apparently concede that Congress did not

expressly delete § 256 from the ADEA as part of the 1991 CRA. They argue, however, that the mere fact that § 256 references § 255 makes it obsolete in the wake of the 1991 CRA. *See* Brief of Appellants, p. 61.

The reasoning of the District Court and Eleventh Circuit demonstrates the weakness of Petitioners' argument. As the District Court properly observed, the ADEA incorporates the collective action provisions of the FLSA, including 29 U.S.C. § 256, which governs "when an action is commenced." (App. 44a); *see also Grayson v. Kmart Corp.*, 79 F.3d 1086, 1105-06 (11th Cir. 1996) (expressly holding that ADEA incorporates provisions of 29 U.S.C. § 256). Under § 256, an ADEA collective action is commenced only when a named plaintiff files both a complaint and a written consent to become a party plaintiff. *Id.* at 1106. Neither the language of the 1991 CRA, nor any case law interpreting it, suggest that Congress intended to do anything more than modify the ADEA statute of limitations. Indeed, in modifying the statute of limitations in the Act, Congress deleted only the ADEA's reference to 29 U.S.C. § 255 — it did not delete or otherwise disturb the applicability of the collective action procedures articulated in 29 U.S.C. § 216(b) to ADEA claims. *See* 29 U.S.C. § 626(b), (e); *Little v. Aid Ass'n for Lutherans*, 62 F.3d 257, 259 (8th Cir. 1995); *Browning v. AT&T Paradyne*, 120 F.3d 222, 223 (11th Cir. 1997). As the District Court noted:

> [t]he mere modification of the statute of limitations for ADEA claims did not affect the procedure, provided in 29 U.S.C. § 256, for commencing a collective action. FLSA's collective action procedures were applied to ADEA collective actions prior to the 1991 amendments; therefore, if Congress wanted to provide a different rule for commencing an ADEA collective action, they could have done so.

(App. 44a). The District Court and Eleventh Circuit in this case simply joined the overwhelming precedent supporting the

proposition that a named plaintiff in an FLSA collective action does not commence the collective action, and therefore does not toll the statute of limitations, until he files his complaint and his written consent. The Court, therefore, should deny the Petition for Review of this case.

CONCLUSION

For all of the foregoing reasons, this case presents no issue that merits this Court's attention or review, and the Petition should therefore be denied.

Respectfully submitted,

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